Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-1136

In THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

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CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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# BRIEF FOR THE PETITIONER IN REPLY

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A4) is reported at 809 F.2d 792. The opinion of the district court (Pet. App. B2-B8) is reported at 617 F. Supp. 101.

## JURISDICTION

The judgment of the Court of Appeals (Pet. App. A1) was entered on November 13, 1986. The petition for a writ of certio-

rari was filed on December 29, 1986. The brief in opposition was filed on April 20, 1987 and served on Petitioner on April 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## ARGUMENT

### POINT I

### RESPONDENT'S ARGUMENT THAT THERE IS NO CONFLICT AMONG OUR CIRCUIT COURTS IS SIMPLY INCORRECT.

The Respondent's opening argument cited (Resp. 5) that the decision of the Federal Circuit is correct and does not conflict with any decisions of this Court or of any other court of appeals is simply incorrect and contrary to the record.

In order to obtain a third extension of time, which was approved, the Respondent's attorney filed with Clerk of this Court a letter, dated March 30, 1987, which is Appendix A herewith, in which the reasons given in part are as follows:

"This case presents complex issues that are of concern to all branches of

the military. It also presents an apparent conflict among THE circuit courts."

The Petitioner's writ contains various and numerous cases supporting that there is widespread conflict among our circuit or federal courts on the subject matter, particularly requiring exhaustion of military remedies as predicate for members of armed forces in civil courts.

POINT II

THE QUESTION PRESENTED BY RESPONDENT IS MISREPRESENTATIVE OF THE CASE.(Resp.(i)).

Petitioner calls such action manipulative and are the desperate acts of the government which will do anything to win against a veteran(s).

The issue presented in this case is not whether the monetary cause of action accrued at the latest in 1962 or 1982 as Respondent contends, but rather whether the district court erred in failing to address and barring action accrued in 1982 with suit filed in 1983 challenging

the Respondent's arbitrary and capricious and or misrepresentative final agency denial (Pet. App. E1) conferred by 10 U.S.C. §1552 and 28 U.S.C. §1361 and "right of Review" under 5 U.S.C. §702 (Pet. writ), which is first and foremost.

Thusly, there can be no bar to this §1361 and §1552 suit by the six-year statute of limitations under §2401(a) on a cause of action tolling until 1988 under existing law. As such Petitioner's or veteran's case has merit in fact and law.

POINT III

THE RESPONDENT CONTINUES TO MISREPRESENT THE CASE OTHERWISE HIS DEFENSE COLLAPSES.

Although the record and Petitioner's writ, supported by substantial evidence, clearly shows that his suit is bifurcated primarily as a nonmonetary claim under §1361, and a monetary claim under §1346, the Respondent's argument is cleverly couched by misrepresentation to mislead

this Court into believing that this is soley a monetary suit on a claim accrued in 1952 or at the latest in 1962 upon Petitioner's retirement (not discharge), and thusly barred by the six-years statute of limitations under §2401(a).

For example, the Respondent argues (Resp. 3) that "Petitioner asserts that the statute of limitations did not begin to run until the Correction Board issued its decision in 1981" and that "this Court rejected a substantially similar argument, holding that a money claim that is ripe for judicial resolution must be filed "'within six years after such claim first accrues'" and that the six-year statute cannot be extended by the pursuit of various administrative remedies", but he evades that petitioner's suit is primarily based on a nonmonetary claim (Pet. Appendix B herewith) of the alleged arbitrary and capricious depriva-

tion of the right, conferred by the Act of October 25, 1951 under 10 U.S.C. §1552 as well as 28 U.S.C. §1361, to the Respondent's action in 1981 and 1982, necessary to correct an error or remove an injustice, and by "Right of Review" by the court by suit filed in 1983 seeking relief other than money damages provided by 10 U.S.C. §702. (See Gordon v. United States, Ct. Cl., 121 F. Supp. 625; Uhley v. United States, Ct. Cl., 121 F. Supp. 674; Hodges v. Callaway, 5th Cir., 499 F.2d 417; Baxter v. Claytor, USCA D.C. Cir., 652 F.2d 181; and Moen v. United States, Ct. Cl., 121 F. Supp 677.

In the above cases, the courts Reversed and Remanded, respectively. In Moen, the court overruled motion to dismiss. In Uhley, the court denied Defendant's motion to dismiss, finding:

"We think it is clear, under the facts and circumstances of this case, that Plaintiff's claim did not first accrue

on December 24, 1945, as defendant contends.

## POINT IV

### RESPONDENT'S CASE LAW PRESENTED MISREPRESENTS THE CASE.

As aforementioned, the Respondent is attempting to cloud the nonmonetary claim by focusing only on the monetary claim to get this Court to favor him, erroneously.

Therefore, the case law presented by Respondent is not applicable to the Petitioner's primary claim of the Respondent's wrongful denial of his application in 1981 and 1982, and is contrary to cases presented by Petitioner in his writ and information herein.

As such, the Respondent's assertion that "None of the appellate decisions cited by petitioner(Pet.29) is even remotely on point"(Resp.8) is simply incorrect.

## POINT V

### THE RESPONDENT'S ARGUMENT THAT EXHAUSTION OF REMEDIES WOULD BE A DISABILITY IS SELF-SERVING.

The Respondent's argument that the exhaustion of administrative remedies in such case would engraft (another) disability upon §2401(a) (Resp. 7) is contrary to statute and case law.

In Ogden v. Zuckert, D.C. Cir., 298 F.2d 312 (Pet. 30), the court affirmed the purpose of the Board of Correction of Military Records, provided by §1552, was intended for relief from error or injustice at hands of armed forces and was not intended to preclude judicial review.

As aforementioned, Respondent has presented no opposition (statutes) to Petitioner's primary nonmonetary claim, as he has no defense against same.

POINT VI

RESPONDENT EXPRESSED WILLINGNESS TO CORRECT PETITIONER'S RECORD BUT ACTED ON A DECEPTIVE LEGAL OPINION OF THE JUDGE ADVOCATE GENERAL (TJAG) (Resp. 3).

In correspondence, dated 3 Oct 80, from Respondent acting through the ABCMR

to TJAG, it was requested that the case be reviewed for legal deficiency. Futher, "If it is determined that the proceedings are legally deficient, it is requested that appropriate administrative action be taken." TJAG informed that no legal error was found, which is contrary to the record (Pet. 18-21) and is deceptive. The record clearly shows that Petitioner's Constitutional, statutory and regulatory rights were prevalently violated. The correspondence is Appendix B herewith.

POINT VII

RESPONDENT'S ARGUMENT THAT THE DISTINCTION BETWEEN MONETARY AND NONMONETARY CLAIM SURELY COMPORTS WITH COMMON SENSE IS CORRECT.

The Respondent's statement that "Petitioner did not seek equitable relief in an effort to "clear his name" (Resp. 10), is simply incorrect and contrary to his application to the ABCMR on record.

Petitioner's application foremost requested relief from error or injustice

and lastly right of compensation.

Therefore, upon determining that the Respondent violated Petitioner's Constitutional, statutory and regulatory rights in denying him promotion because of the Army's violations of its own regulations, and reverses the decision of the court below on Petitioner's nonmonetary claim, this Court can and should set aside or allow Petitioner to amend his complaint not seeking monetary claim in the court, and direct the Respondent to correct Petitioner's record to show appointment to warrant officer [1] retroactive to 1952 and substantive right to compensation founded upon the Act of Congress, 10 U.S.C. §1552, which authorizes boards for correction of military records to

1. The Career Compensation Act of 1949 authorizes four warrant officer pay grades: W-1 (junior grade and W-2, W-3 and W-4 (Chief). Based on his exemplary record, Petitioner would have retired at the minimum W-2 or maximum W-4 pay grade.

award back pay. (See Sanders v. United States, 594 F.2d 804, 808-11 n. 11, 219 Ct. Cl. 285 (1979), cited with approval in Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586.

POINT VIII

RESPONDENT CONTINUES TO MISREPRESENT THE FACTS.

Although alleged Army violations in 1952 and Respondent's wrongful denial in 1982 were not a ground in his motion to dismiss (Pet. App. B2), which renders the matter moot since the only issue involved is district court's erroneous decision barring petitioner's first and foremost nonmonetary claim, the Respondent nevertheless continues to misrepresent the facts, contrary to the record.

For example Respondent states:

1) that Petitioner challenges a 35-year old army decision (Resp.5), when in fact suit is against Respondent's arbitrary and capricious and or misrepresentative

final action in 1982 (Pet. 18);

2) that Petitioner was advised in 1952 of denial of promotion (Resp. 5), but evaded that notification (Pet. App. D1) was WITHOUT REQUIRED Constitutional, statutory and regulatory reasons given for denial and that the Army acted on an incomplete application violative of regulations (Pet. 18-21);

3) that only limited documentation is (now) available (Resp. 12), when all papers are available except a regulatory required educational waiver and Commander's recommendation thereof on the waiver containing Petitioner's prerequisites, but was lost by the Army and resulted in the Army ruling on an incomplete application (Pet. 18-21);

4) that 2-years college was required (Resp. Note 1), but withheld that waivers of any prerequisites were permitted (Pet.5).

5) that Petitioner has never given any

reasons for entitlement of promotion in 1952 (Resp.12), when his prerequisites were on the requested waiver and Commander's comment required (Pet.5,6), which as aforementioned the Army lost, or are contained on the record on appeal certified by Respondent, which shows Petitioner's demonstrated ability, high mental capacity or outstanding performace of duty to a degree which compensated for lack of prerequisites for which educational waiver was requested. Further shows, that Petitioner had a superior efficiency rating for ten (10) years prior service; awarded a seldom given or heard of Certificate of Achievement from CIC; an Area I (IQ) of 127 (110 is minimum required for Commissioned and Warrant Officer); leadership ability in Combat and overseas and stateside assignments; numerous decorations and awards for combat and service; and an exemplary service record both in combat and as a

counterintelligence agent, as attested to by Respondent; and

6) that the district court opinion is relied upon by Respondent (Resp. 4,5,12), but withheld that the opinion for the most part is erroneous (Pet. 22-25) and is the Respondent's, as it was taken verbatim from his Memorandum of Law to dismiss. The district court merely framed its decision (Pet. App. B2-B8) almost entirely on the Respondent's argument, without addressing Petitioner's primary nonmonetary or §1361 claim provided by law aforementioned. In fact or effect Respondent is quoting back his own argument assumed to be the district court's.

## CONCLUSION

For the reasons stated above and in Petitioner's writ, the court of appeals erred in its decision and case law relied upon in affirming the decision of the district court barring suit on limitations.

Neither court addressed Petitioner's primary §1361 and §1552 suit. Moreover, both courts blatantly denied review without statutory power and contrary to 5 U.S.C. §702 which provides for "right of review", affecting millions of other veterans in similar fact situations.

The Respondent's argument should be denied, the petition for a writ of certiorari should be granted, and the Court as an appellate court can and should summarily sua sponte reverse the judgment below and grant Petitioner the relief sought in the interest of justice.

Respectfully submitted.

Clement J. Pacyna

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Dated: April 28, 1987

# APPENDIX

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

March 30, 1987

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Pacyna v. Marsh, No. 86-1136

Dear Mr. Spaniol:

The petition for a writ of certiorari in this case was filed as of December 28, 1986, and was served on the government on January 13, 1987; after two extensions, the government's response is now due on April 4, 1987. We respectfully request, under Rule 29.3 of the Rules of this Court, a further extension of time to and including April 20, 1987, within which to file the government's response.

This case presents complex issues that are of concern to all branches of the military. It also presents an apparent conflict among the circuit courts. Our

consultations with the military services about the position the government should take in response to the instant petition have taken longer than anticipated but are now reaching their close. An additional extension of time is needed to draft and arrange for the printing of a response reflecting these views.

Sincerely,

T/ Charles Fried
Solicitor General

cc: Clement J. Pacyna
1151 Wehrle Drive
Williamsville, New York 14221

SFMR-PACYNA, CLEMENT J. 106-05-7846
(26 Aug 80)
SUBJECT: Request for Correction of
Military Records

TO DAJA-ZX
Military Pers Law Term
2E444

FROM OSA, ABCMR
1E517

DATE 3 Oct 80 Cmt 3
Mr. Gibson/54539

Reference is made to the inclosed application for correction of military records in the case of the above-named individual, particularly the applicant's contention that the action taken by the Department to disapprove his application for appointment as a Warrant Officer was legally deficient.

It is requested that the attached case be reviewed. If it is determined that the proceedings are legally deficient, it is requested that appropriate administrative action be taken. If the proceedings are deemed legally sufficient, it is further requested that the case be returned to this office with your comment

and legal opinion regarding the legal sufficiency of the proceedings.

S/ (illegible signature)
T/ John W. Matthews
for/Executive Secretary

3 Incl
1. DD FM 149 w/incl
2. OMPF
3. CMT 2 fr MILPERCEN dtd 10 sep 80